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No. 04-1329

In the Supreme Court of the United States

ILLINOIS TOOL WORKS INC. AND TRIDENT, INC.,
Petitioners,

v.

INDEPENDENT INK, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners file this supplemental brief pursuant to Rule 15.8 of the Rules of this Court calling the Court's attention to a recent speech by Assistant Attorney General for Antitrust R. Hewitt Pate in which he expressly recognized that "there is still some debate in [the] courts" with respect to the question presented in this case regarding the market power presumption and that a grant of certiorari here would "provide a good opportunity to settle the question once and for all." R. H. Pate, *Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust*, at 13 (June 3, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/209359.pdf.

In his remarks – delivered at a competition law workshop sponsored by the European Union – Mr. Pate stated that "[i]n the view of the Department of Justice and the Federal Trade Commission, the idea that IP rights cannot be presumed to create market power is a settled question." *Id.* at 13. He explained:

> [w]hile intellectual property grants exclusive rights, these rights are not monopolies in the economic sense: they do not necessarily provide a large share of any commercial market and they do not necessarily lead to the ability to raise prices in a market. A single patent, for example, may have dozens of close substitutes. *The mere presence of an intellectual property right does not permit an antitrust enforcer to skip the crucial steps of market definition and determining market effects.*

Id. at 12-13 (emphasis added).

Citing the Federal Circuit's decision in this case, Mr. Pate recognized that, in contrast to the federal agencies' settled view, "there is still some debate [with respect to the market

power presumption] in courts that decide private party antitrust claims." *Id.* at 13 (citation omitted). He observed that the Federal Circuit "held that Supreme Court precedent compelled it to conclude that a patent *does* raise a presumption of market power in an IP tying case" but that the court of appeals' opinion "invited the Supreme Court to reverse." *Ibid.* (citations and footnote omitted; emphasis in original).

Mr. Pate concluded that a grant of certiorari in this case "would provide a good opportunity to settle the question once and for all." *Ibid.*

For the foregoing reasons, and those stated in the certiorari petition and reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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